

## Exhibit 7

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

ENTERTAINMENT SOFTWARE  
ASSOCIATION, VIDEO SOFTWARE  
DEALERS ASSOCIATION, and  
MICHIGAN RETAILERS  
ASSOCIATION,

Plaintiffs,

v.

HONORABLE GEORGE CARAM STEEH

No. 05-73634

JENNIFER GRANHOLM, in her  
official capacity as Governor  
of the State of Michigan;  
MICHAEL A. COX, in his  
official capacity as Attorney  
General for the State of  
Michigan, et al, and KYM L.  
WORTHY, in her official  
capacity as Wayne County  
Prosecuting Attorney,

Defendants.

HEARING ON MOTION FOR PRELIMINARY INJUNCTION

Monday, October 31, 2005

APPEARANCES:

For the Plaintiffs:

DENNIS J. LEVASSEUR, ESQ.

For the Defendants:

DENISE C. BARTON, ESQ.

To Obtain Certified Transcript, Contact:  
Ronald A. DiBartolomeo, Official Court Reporter  
Theodore Levin United States Courthouse  
231 West Lafayette Boulevard, Room 740  
Detroit, Michigan 48226  
(313) 962-1234

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N O N E

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5 THE COURT: Okay. This is Entertainment  
6 Software versus Jennifer Granholm. This is plaintiff's  
7 motion for preliminary injunction.

8 MR. LEVASSEUR: The question before the Court  
9 today is, of course, is whether to allow or to go into  
10 effect a law which expressly bands the distribution and  
11 display of fully protected speech based on a disfavored  
12 content, and I think it is fair to say that it is a rare  
13 day, indeed, when that is the right answer to allow such  
14 law to go into effect under the First Amendment, but I  
15 thought before we get further into the issue on the  
16 constitutional provision of a preliminary injunction, I  
17 just want to talk a little bit about the practical aspects  
18 of this, the equities that ought to be considered as well  
19 by the Court if I could.

20 It is, of course, clear that the allowing an  
21 unconstitutional law to go into effect causes irreparable  
22 harm to -- under the First Amendment. That's pretty well  
23 established.

24 In addition though, if this law is allowed to go  
25 into effect, there will be a lot of practical problems

1 with the many retailers across the state who are suddenly  
2 going to have to figure out which games are and are not  
3 covered by the statute, deciding which ones will be  
4 displayed in the stores, which ones that have to require  
5 I.D.'s for to sell as they are just about to get ready for  
6 the Christmas season. There is only four weeks before the  
7 law takes affect. So there are very serious practical  
8 problems.

9 In terms of the equities on the other side, I  
10 think it is important to recognize that it is not as if  
11 the state or the country are facing some intimate public  
12 health emergency that the Court needs to take into  
13 account. In many ways the crime situation in this country  
14 cuts against it in claim of necessity to for this kind of  
15 ever regulation of speech in accepting the proposition  
16 which I don't accept, that there is any evidence out there  
17 that these games are causing any bad behavior in the  
18 world.

19 With the Court's indulgence, I went to the  
20 Department of Justice web site the other day, and I would  
21 proffer one more piece of evidence if I could, which is  
22 just evidence about crime statistics in this country, both  
23 juvenile statistics and overall violent crime statistics.  
24 With the Court's indulgence, I will hand it up.

25 THE COURT: All right.

1 MR. LEVASSEUR: What these two documents  
2 show, the first of all the single page document deals with  
3 overall violent crime rates in this country. As you'll  
4 see, the Justice Department reports that there was a  
5 precipitant decline in violent crimes in this country  
6 every year since 1994 to the point where in 2004 violent  
7 crime reached the lowest level reported by the Department  
8 of Justice. And over on the second document dealing with  
9 violent crime for juveniles, on Page 5 of that document,  
10 there's a graph that says -- this shows that the juvenile  
11 violent crime index in 2003 was lower than any years since  
12 at least 1980 and 48 percent below the peak year of 1994.

13 That year 1994 is significant because that's, as  
14 the articles that the state has put in the record reflect,  
15 that's about the time when these are more realistic and  
16 more graphic violent video games became popular and began  
17 to be sold.

18 So what we have here is a phenomenon in this  
19 country where this particular medium has been singled out  
20 as having cause some great problem in the country and in  
21 reality there's no indication, at least in terms of  
22 overall crime rates, that there is correspondence between  
23 reality and the claims that are being made about that  
24 particular medium.

25 Finally, just one more point about the practical



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**MR. LEVASSEUR:** The question before the Court today is, of course, is whether to allow or to go into effect a law which expressly bands the distribution and display of fully protected speech based on a disfavored content, and I think it is fair to say that it is a rare day, indeed, when that is the right answer to allow such law to go into effect under the First Amendment, but I thought before we get further into the issue on the constitutional provision of a preliminary injunction, I just want to talk a little bit about the practical aspects of this, the equities that ought to be considered as well by the Court if I could.

It is, of course, clear that the allowing an unconstitutional law to go into effect causes irreparable harm to -- under the First Amendment. That's pretty well established.

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22 overall crime rates, that there is correspondence between  
23 reality and the claims that are being made about that  
24 particular medium.

25 Finally, just one more point about the practical

1 affects. Even taking this study at face value, they are  
2 talking about long term effects over years not any  
3 immediate thing. So allowing the law to go into effect  
4 they are not going to effect -- isn't going to do anything  
5 in the short run while we take the time to litigate rest  
6 of this case. They can't claim that sometime in the next  
7 two weeks if that law doesn't go into effect, there is  
8 going to be any affect on the way people behave or the way  
9 their psyche are affected.

10 Now taking -- since I'm giving up value on  
11 equities, I think all we have to do is have a reasonable  
12 likelihood of success on the merits, but the reality is we  
13 have highlighted the success on the merits, and the reason  
14 for that I think is because of law is very clear,  
15 including the binding decision of the Sixth Circuit in the  
16 James case which largely answers the questions before this  
17 Court. It holds first of all, that a law like this --  
18 it's equivalent for many purposes -- this kind of law  
19 would subject to the strict scrutiny of violent video  
20 games. Like any of the video games are protected  
21 expression, and when we try to sensor them based on their  
22 violent content, that requires constitutional scrutiny of  
23 the highest burden.

24 The other important point that the James case  
25 makes is that when you -- if you're trying to justify such



1 a law based on the supposition that these games are going  
2 to cause people to go out and be violent, be aggressive to  
3 commit crimes, then you get into the whole category of  
4 Brandenbrug where there is a strong, strong presumption  
5 against censored speech in order to affect the conduct of  
6 those people who would be the recipients of the speech.

7 The usual rule that almost in every circumstance  
8 is that you punish the conduct, you regulate the conduct.  
9 You don't regulate the speech. Even if you think that it  
10 might, in fact, have some role in motivating that conduct,  
11 that is not the way our system works. The only exception  
12 under Brandenburg where you have incitement which means  
13 speech aimed at inciting imminent law as violence and  
14 likely to cause imminent law as violence, a claim that is  
15 not even being made here.

16 All of those points are made in the James case  
17 where Judge Balk explained all the reasons why a tort suit  
18 seeking to punish the sellers of these same kinds of games  
19 would be unconstitutional, and I think the law does the  
20 same thing would have to meet the same standards, the  
21 standards which on its face the evidence of the state has  
22 come forward with doesn't even not come close to meeting.

23 What do they do then? They say, we're not trying  
24 to prevent violence. We're trying to prevent  
25 psychological harm, but if you push a little bit of what

1 it is they mean when they say "psychological harm", what  
2 the brief says, what the studies say, psychological harm  
3 makes people more aggressive, more violent. So it is all  
4 circular, and to the extent it means anything else other  
5 than that, other than behavior, what they're saying, we  
6 think we should be able to regulate this speech because it  
7 makes people feel a certain way, think a certain way, a  
8 very, very problematic justification for a law under the  
9 First Amendment.

10 Another case that I think is very helpful in that  
11 regard is the Supreme Court decision in Ashcroft versus  
12 Free Speech Coalition that we cite in our papers. That  
13 was a case about what they called virtual child  
14 pornography, which looked like child pornography, but were  
15 not made with actual children. They were computer  
16 generated or made with young adults who looked like  
17 children. The Supreme Court said that material is fully  
18 protected under the First Amendment, and validated a  
19 federal law that attempted to sensor that material, and  
20 one of the justifications that was offered there was that  
21 this material will encourage people to out and commit  
22 crimes against children. It is also psychologically  
23 harmful to people, and the court said no. Brandenburg  
24 controls. We have to be very careful. We certainly don't  
25 think it is thought control by itself which is something

1 that the First Amendment allows, it contemplates, and so I  
2 see between the James case and the Free Speech Coalition  
3 case and, of course, the decisions of the Seventh and  
4 Eighth Circuits, and other courts who have had cases  
5 almost exactly like this case, the law is very clear that  
6 these kinds of justifications, these kinds of arguments  
7 are not going to satisfy strict scrutiny. Much of what  
8 they are saying is that it is wholly legitimate under  
9 First Amendment. You can't come in and say we don't think  
10 it would be good for people to have these feelings. We  
11 don't think it would be good for people to have these  
12 thoughts.

13 There are a whole variety of other problems that  
14 Judge Posner pointed out in his opinion in the Seventh  
15 Circuit. One of the problems with these kinds of laws is  
16 that they completely ignore the fact that there are a  
17 whole lot of other media out there that have just as much  
18 violence or more violence than what we are talking about  
19 in video games.

20 What this law would mean potentially, depending on  
21 how you would apply it -- and I'm not sure how you can  
22 ever be sure on how the law cuts on any one game -- but it  
23 might well mean that it is illegal for a 16 year old to  
24 buy the Lord of the Rings game even though you go buy him  
25 the video or the movies. There's an enormous amount of

1 violence in those movies and there is violence in the  
2 games too, but that makes very little sense to try to  
3 limit sales or access to one and not the other, because  
4 for one thing it means it is unlikely to actually have any  
5 impact even if you assume that media do turn kids into  
6 more violent kids, which if we ever have to have an  
7 analysis of all of that, believe me, there is a whole lot  
8 of expert testimony on the other side and cross  
9 examination.

10 I guess my point today is not that you should be  
11 sifting through all of the studies and trying to decide  
12 who's right or who's wrong about the science. The science  
13 does not on its face justify the law because it doesn't  
14 satisfy the incitement standard. It doesn't show anything  
15 else which would justify sensoring protected speech.

16 **THE COURT:** It wasn't clear to me that the --  
17 your opponent in this case would concede that incitement  
18 is not an issue relative of some evidence to support that  
19 contention that this violent crime is not designed to  
20 incite --

21 **MR. LEVASSEUR:** I don't think they claim  
22 there is a design to incite violence, which is one of the  
23 elements that you have to satisfy. The only thing that I  
24 read them to say about that is they found some example of  
25 a car accident that occurred where some crazy teenager got

1 in the car and tried to imitate this driving game that he  
2 had been playing and he drove and caused an accident, and  
3 somehow that satisfies the Brandenburg standard. It  
4 doesn't make the speech incitement that somebody reacted  
5 to it. People have been trying to do these copycat  
6 arguments for years on TV, on movies, video games. They  
7 are never allowed because it's just one person's reaction,  
8 and if we are going to sensor things on the basis of that,  
9 where does it stop?

10 THE COURT: The other thing that your  
11 opponent argues is that these games are somehow  
12 distinguishable from the other media by their interactive  
13 nature.

14 MR. LEVASSEUR: They don't have any evidence  
15 of that. There is nothing even in their own scientific  
16 studies. It is Professor Anderson who is the guy that  
17 comes to each of these places and testifies. He doesn't  
18 claim that he has any scientific evidence. He says, well  
19 it stands for reason that it might be worst, but other  
20 articles which they included show that TV effects are  
21 stronger than the video game effects. I don't see any  
22 basis for, in fact, for doing that, for saying that. It  
23 certainly they are not more violent. I mean, if you watch  
24 the same movie as the game, it is probably more realistic  
25 to see the Lord of the Rings movie than it is to play the

1 Lord of the Rings game which is a cartoon. It is not a  
2 movie. So I don't see how you can rally do that.

3 There is a whole other problem of vagueness which  
4 is how you apply a standard which says extreme violence  
5 and graphic depiction which has to be -- the victim has to  
6 be real, appearing to be a human, which in the video game  
7 world is a very difficult problem. People go and come  
8 between human and other forms. There are zombies,  
9 there's -- you know, how do you figure out who exactly  
10 qualifies, but the primary problem here is it is just  
11 plainly content base sensorship of speech that is not in  
12 any way lesser protection than any other speech, and they  
13 don't have a basis for this either legitimate -- even  
14 legitimate let alone sufficiently compelling that you can  
15 get over the strict scrutiny standards.

16 **THE COURT:** This general proposition of the  
17 Court would be considering constitutional challenges to  
18 the statute as applied as distinguished from finding that  
19 it is unconstitutional on its face preliminary injunctive  
20 relief would not be appropriate, is that a fair statement?

21 **MR. LEVASSEUR:** I suppose that -- depends on  
22 what kind of challenge it was, your Honor. I mean, in  
23 some situations I think it might still be appropriate, but  
24 clearly here we're talking on its face. The entire law  
25 needs to be held -- needs to be narrow. Here we're saying

1       enjoin the entire operation of the law because on its face  
2       in its entirety it is unconstitutional, and the equities  
3       certainly argue in favor of maintaining the status quo in  
4       the meantime given all the things that I mentioned at the  
5       outset.

6               Your Honor, perhaps it make sense, since the  
7       burden justifying this law under the First Amendment falls  
8       on the state, the burden of coming forward with sufficient  
9       state interest and explaining why that's the least  
10      restrictive method. Perhaps I should at this point turn  
11      over the podium and see what kind of justification they  
12      want to emphasize today, and perhaps come back and do  
13      rebuttal.

14                   **THE COURT:** That's fine. Thank you.

15                   **MS. BARTON:** Good afternoon. Denise Barton  
16      on behalf of the state defendants.

17               I would like to respond -- or at least address the  
18      first point which is that the plaintiffs are asking for--  
19      enjoin the implementation of the entire statute. In this  
20      case they are actually only challenging one part of the  
21      statute. Plaintiffs are not challenging the sexually  
22      explicit nature of the statute and so I don't see how they  
23      justify enjoining the entire statute when they conceded  
24      that at least part of the statute does comply with the  
25      law.

1 Now with respect to the ultra-violent explicit  
2 video game aspect of the statute, that's part two of the  
3 law, and that's essentially why we're here today.

4 Now plaintiffs have submitted some crime  
5 statistics which by having them presented today, obviously  
6 I have not had an opportunity to look at them, but in  
7 essence, our argument is not that because crime is going  
8 down, that's why the legislature considered this evidence  
9 when it was deciding whether to pass the statute. In  
10 fact, if you look at findings of the statute, you will  
11 find that the legislature specifically had before it a  
12 number of studies which talked about the juvenile brain is  
13 not only different from the adult brain, but the level of  
14 maturity of an individual who is a juvenile means that  
15 person is subject to peer pressure, that person's brain is  
16 more malleable. If anybody had any teenagers, you would  
17 well see how sometimes they are impacted by other  
18 influences which in an adult would not be, and I call this  
19 Court's attention to the case of Roper v Simmons, which is  
20 the death penitentiary case which the Supreme Court  
21 decided, and the reason why I would like this Court to  
22 look at this case very closely is because in Roper, the  
23 Court relied on social science research, and that social  
24 science research provided three reasons why the court said  
25 you cannot execute a juvenile under th age of 18, and



1 those three reasons are that the juvenile has a lack of  
2 maturity and an underdevelop sense of responsibility.  
3 Juveniles are more vulnerable or susceptible in the way of  
4 influences and outside pressures, and the character of a  
5 juvenile is not the same as that of an adult.

6 Now there has been no court that has addressed  
7 this video game issue since Roper v Simmons was handed  
8 down, and there has been no U.S. Supreme Court decision  
9 that says that the Michigan legislature could not adopt  
10 the statute which limits access of ultra violent explicit  
11 video game to minors.

12 I would like bring special attention to the fact  
13 that what the law is not saying, it is not saying that a  
14 juvenile can never look at mature rated video, or that a  
15 parent cannot buy a mature rated video for an adult (sic).  
16 What the legislature says, we do not want retailers making  
17 the decision of what kind of video games are being played  
18 in the home, and this Court -- the U.S. Supreme Court  
19 rather in Ginsberg recognizes that parents do have a  
20 special role in rearing the morals and values of their  
21 children.

22 Now with respect to whether Brandenburg applies,  
23 as our brief makes clear, the state does not need to  
24 revive world war harms despite the fact that we do have  
25 one fatal accident which occurred in Ingham County in

1 which one individual was killed after having watched a  
2 violent video game and another person, as we understand  
3 it, is in a coma and will not -- and is not likely to  
4 recover.

5 And as to who has the burden of proof, the  
6 plaintiffs have the burden of proof in seeking an  
7 injunctive relief, and even though the Christmas season is  
8 coming up, and the fact that, in terms of the equities,  
9 the industry even admitted when they presented testimony  
10 at the hearing in Lansing, that we're only talking about a  
11 seven percent of all the video games are rated mature.  
12 You're not talking about this law impacting the entire  
13 realm of video games.

14 THE COURT: Wait a minute. Rated mature by  
15 whom?

16 MS. BARTON: Rated mature by their own  
17 industry.

18 THE COURT: So is it then that rating system  
19 the system that would be employed to decide whether theses  
20 videos are too explicitly violent or not?

21 MS. BARTON: Well, in terms of the rating  
22 system, the rating system is used -- can be used in the  
23 affirmative defense part of the statute, and the industry  
24 at least back when the legislature was considering the  
25 statute, we're only talking about the mature rated videos

1 because by their own rating system, a mature video is one  
2 that should not be look at by someone under the age of 17.  
3 So we're talking only about a narrow percentage of the  
4 video games that would be involved in this case.

5 **THE COURT:** I don't really know, but I would  
6 suspect that seven percent sounds like a small proportion  
7 of the video games, but nevertheless it would amount to a  
8 lot of video games in absolute numbers.

9 **MS. BARTON:** They have not come forth and  
10 shown any statistics of how many games we are talking  
11 about. What they are saying is no, you should not make  
12 any change in the law. Keep the law status quo because  
13 seven percent of the games, a particular retail  
14 establishment might have some difficulty in applying the  
15 law.

16 **THE COURT:** If you're a retailer in the  
17 business, how would you apply the law? Wouldn't you  
18 simply to be safe to avoid going to jail decide not to  
19 sell any mature rated video games to minors?

20 **MS. BARTON:** What would I do if I was  
21 retailer?

22 **THE COURT:** Yes, assuming you didn't want to  
23 go to jail.

24 **MS. BARTON:** I think what I would do is look  
25 at the rating system, read the statute, and as to those

1 which there might be a question, they have counsel.  
2 Mr. Smith been retained. In fact, he's in litigation now  
3 in the Seventh Circuit on this issue, and they call upon  
4 him for his advise and counsel. In fact, when the  
5 plaintiffs filed their reply brief, they attached two  
6 expert reports which we would like the Court to disregard  
7 those two reports for one, the reports are submitted in a  
8 reply. We have not had an opportunity to take those  
9 depositions of the individuals whom are proffering as  
10 experts, at least in their reply.

11 Additionally, their reports refer to paragraphs  
12 from other reports which have not been provided. So I am  
13 at a loss and this Court is at a loss as to the strength  
14 of those expert reports.

15 **THE COURT:** I guess -- let's assume that you  
16 have established the compelling state interest, and assume  
17 that the -- that the -- that you even establish the law to  
18 be narrowly tailored to meet the interest that you  
19 defined, and again, as you would define the state interest  
20 involved in this case it is how? How would you--

21 **MS. BARTON:** I would direct the Court's  
22 attention to the legislative findings, and that's attached  
23 to the plaintiff's first amended complaint, and what it  
24 talks about is that there is a psychological harm to  
25 children by being exposed to ultra violent explicit

1 videos. Even though the legislative history refers to the  
2 fact that protecting minors from possibly aggressive  
3 behavior, we do not have to meet the Brandenburg test  
4 because of Brandenburg test does not apply when talking  
5 about psychological harm to a minor.

6 **THE COURT:** So assuming I buy all of your  
7 argument up to that point, how in the world can you argue  
8 that this statute is sufficiently definite for retailers  
9 to put them on notice of their obligation not to sell in  
10 order to avoid jail?

11 **MS. BARTON:** Well, your Honor, if you look at  
12 the Eighth Circuit court decision in the Interactive  
13 Software case, the court in that case specifically talks  
14 about the vagueness issue and says, that the test is  
15 whether an ordinary person is put on notice as to what's  
16 illegal. It does not have to be mathematical precision or  
17 technologically precise, and even the rating system that  
18 the industry adopts incorporates some of the same language  
19 that the statutes refers to.

20 **THE COURT:** So every person, the retailer, is  
21 suppose to view and sell for herself all of the video,  
22 suppose to be in depth enough at the game to go at every  
23 level in the video game, right, because in some of these  
24 games the lower levels don't contain presumably altra  
25 violent acts, but they have to be able to get to the

1 higher levels, which I consider myself relatively  
2 ordinary. I know there is no chance in the world, since  
3 I've never even played one of these games that -- or an  
4 interactive video game that I took it to the top level to  
5 order to observe what's there, and then suppose to make  
6 this judgment about whether this is ultra violent or not.  
7 Is that what you're saying?

8 MS. BARTON: Your Honor, that's the same  
9 question that they have even in complying with part one,  
10 because in part one the store cannot distribute to minor a  
11 sexually explicit video.

12 THE COURT: Maybe that should be struck too.

13 MS. BARTON: But they are not challenging  
14 that.

15 THE COURT: So what you're saying is because  
16 part one might also be unconstitutional, and they are not  
17 asking me to strike it, therefore, I should not strike  
18 part two?

19 MS. BARTON: No, your Honor. What I'm saying  
20 is that if you look at part one in which based on what  
21 you're asking me, a retailer may have to look at a video  
22 and decide whether it is sexually explicit material.

23 THE COURT: And in order to look at it, he  
24 has to be able to get to all the levels, right?

25 MS. BARTON: That's the same issue that

1 they're going to have in looking at the altra violent  
2 explicit video game. They are not in any different  
3 situation when it comes time to enforcing the statute  
4 because they are going to have to look at the video in  
5 order to comply with the law which they said they are not  
6 challenging.

7 So I don't see how there is an incremental  
8 ambiguity or incremental step and now saying well, the  
9 retailer is going to have difficulty deciding whether  
10 altra violent explicit video games, therefore I will  
11 enjoin the entire law from being implemented.

12 **THE COURT:** Isn't it possible counsel, that  
13 the challenge to the sexual contents of this material as  
14 you go through the levels would be addressed at the time  
15 that a prosecution is undertaken as oppose to the  
16 challenge here which is to part two only as you say as a  
17 facial challenge?

18 **MS. BARTON:** Well, your Honor, that's the  
19 same issue again because under part two, if someone is  
20 prosecuted, they can raise the challenge the First  
21 Amendment in that particular prosecution. So they are in  
22 no worst position.

23 **THE COURT:** Right. I just don't  
24 understand -- well, all right. Go ahead.

25 **MS. BARTON:** With respect to whether the

1 retailer is going to have to sit there and actually play  
2 the game, they are already saying that the system is  
3 working, which is the rating system which they have, and  
4 in that the rating system they have to decide whether the  
5 material is sexually explicit. They have to decide  
6 whether it is rated T for teens. They have to decide  
7 whether it should be rated for an adult.

8 THE COURT: Who, the individual retailer?

9 MS. BARTON: I'm saying that based on what  
10 you're questioning, you're saying that someone would have  
11 to sit down with video game and keep playing until they  
12 access the codes or get to a higher level to determine  
13 whether this is an illegal game.

14 THE COURT: Whether they are subject to going  
15 to jail.

16 MS. BARTON: Exactly.

17 THE COURT: But that's why I asked you, is it  
18 your contention that a retailer should reasonably then  
19 just rely on the rating system for determining whether a  
20 video is salable or not under the statute?

21 MS. BARTON: That's obviously not going to be  
22 the sole test, but that is one factor that they could look  
23 at also obviously and, in fact, within the statute there  
24 is a good faith defense if someone complies, if a manager  
25 complies with the rating system. Just because the



1 statute--

2 THE COURT: You acknowledge that the only  
3 safe thing for the retailer to do in deciding whether a  
4 given video as altra violent contents or not is to just  
5 refuse to sell anything that's rated mature?

6 MS. BARTON: The only safe thing?

7 THE COURT: Because the only defense that  
8 they would have -- the only defense that they would have  
9 to a prosecution which seeks them to put them in jail for  
10 selling altra violent explicit material would be it's not  
11 rated mature. I have not idea that I should even screen  
12 it, right? That's there only defense that the statute  
13 provides them.

14 MS. BARTON: Well, the other defense that's  
15 provided is they ask for the I.D. of the individual who is  
16 buying it, and so if someone is under the age of 17, then  
17 the retailer is on notice. It is like buying liquor.  
18 They ask for I.D. when you go to the store, and the  
19 individual does not sell liquor to someone who is a minor.

20 Now the fact that there is a difficulty in  
21 implementing the statute, that's not the standard. The  
22 standard is whether the ordinary person has been put on  
23 notice.

24 THE COURT: The ordinary person of what age?

25 MS. BARTON: Ordinary person --

1                   THE COURT: I would suspect that children  
2                   have little more tolerance for violence for example, and  
3                   would view it differently than us oldsters who have not  
4                   been exposed to it during our upbringing.

5                   MS. BARTON: Well, your Honor, because there  
6                   are lines that have to be drawn and because there may be  
7                   some adjustments that have to be felt within the video  
8                   industry, that does not mean per se that it is an  
9                   unconstitutional statute, and even though you may  
10                  sympathize with some of the retailers comply with a new  
11                  law, they will have to comply with a new law anyways  
12                  unless this Court enjoins the entire statute, which they  
13                  are not asking.

14                  I would also like the Court to keep in mind that  
15                  the Seventh Circuit case and the Eighth Circuit cases are  
16                  not cases that we have today. For one, the body of  
17                  research in this area continuously is evolving, and the  
18                  legislative history refers to some of the more recent  
19                  studies in -- that have come up to date on the video game  
20                  industry.

21                  The more recent studies, your Honor, show for  
22                  example that there's a decrease in social behavior. There  
23                  are some other studies which talk about aggressive  
24                  behavior after minors play these ultra violent explicit  
25                  video games, and just like the U.S. Supreme Court paid

1 attention to the social science research in the Roper  
2 case, we think that you can also pay attention to the  
3 social science research that we submitted before this  
4 Court.

5 At this point, your Honor, I would rely on my  
6 brief and indicate that the plaintiff has the burden of  
7 proving irreparable harm. They also have the burden of  
8 proving the substantial likelihood of the merits. The  
9 Seventh and Eighth Circuit cases are not binding on this  
10 Court and, in fact, even in the James case it did not talk  
11 about legislative record. What it did, it examined  
12 whether the individual in the Kentucky incident could be  
13 liable under Kentucky law for the violent behavior that  
14 eventually occurred in that case. The court did not take  
15 an exact scrutiny of the record. The court did not look  
16 at the legislative finding because there was no statute  
17 before it.

18 Therefore, this defendant submits that the Sixth  
19 Circuit in James is not controlling, at least as it  
20 applies to this particular statute. Obviously, the  
21 principle that was held by the court in James is something  
22 that this Court should pay attention to. However, in  
23 James the Sixth Circuit did not say that ultra violent  
24 explicit video games under no circumstances can be  
25 regulated. What it said was it summarized the state of

1 the law up to that point, and since James was decided,  
2 there's been an entire body of research that this Court  
3 has been directed to pay attention to, and we submit that  
4 justifies and proves that the Michigan legislature did  
5 have a compelling state interest when it decided to  
6 regulate these particular ultra violent explicit video  
7 games.

8 Thank you.

9 THE COURT: Thank you.

10 MR. LEVASSEUR: Just a couple of quick  
11 points. I thought I might at least start by trying to  
12 clarify the relationship between the rating system and  
13 what this law does.

14 The rating system as a whole series of age levels  
15 which essentially are guidelines for parents in buying the  
16 games, and the concern -- a major concern is the fact that  
17 it is almost certain that the law as written would apply a  
18 lot of games which have been rated T for example, which is  
19 for people over 13. Games which contained violence, games  
20 which contained killing, but are less graphic or because  
21 they are of a different kind of context in which it  
22 appears are viewed as more appropriate for younger  
23 teenagers.

24 For example, in the record is the Medal of Honor  
25 game landing which has a landing on the beach in Normandy

1 at the beginning. There is a fair amount of killing in  
2 that scene, but it's viewed, at least according to the  
3 SRB, as something that's okay for a 14 year old, and I  
4 think a lot of people would agree with that.

5 The problem is you can't -- rating system is no  
6 aid at all in terms of trying to avoid liability under the  
7 statute. If they wanted to try to do something that would  
8 make sense on the rating system, that's one thing, but  
9 they don't do that.

10 And the affirmative defense that my colleague  
11 mentions does not do that at the back door. It says that  
12 a store manager can't be held liable if the store is  
13 following rating system, but it doesn't say anything about  
14 the clerk who does the sale. It is written in a very  
15 peculiar manner. I don't know quite what they were  
16 getting at but it said if you have managerial  
17 responsibility and you include the rating system, then you  
18 can't be held liable, but your employees are still out  
19 there exposed to liability for making the sales. It  
20 doesn't make a lot of sense to be frank.

21 Basically the other point that I want to make, is  
22 what you're really hearing today and in the brief is a lot  
23 of different arguments for the proposition that we created  
24 a new exception to the First Amendment for violent speech  
25 as applied to kids. The reference to Ginsberg is

1 basically saying, look. We need another kind of obscenity  
2 exception as it applies to kids which the Ginsberg  
3 standard is, and I submit to you that first of all, the  
4 James case expressly says we're not doing that, and the  
5 Supreme Court said that, and basically this issue keeps  
6 coming up and the reality as Judge Posner said in the  
7 Seventh Circuit case, you know, it's a nice thing to think  
8 about, but violence is part of our culture. It's part of  
9 children's literature. It's part of everybody's everyday  
10 experience. You try figure out how you would construct a  
11 Ginsberg exception on the violence side, and you really  
12 can't do it, and there's no real basis for doing it either  
13 in the record.

14 Now as to the social science, we submitted two  
15 expert records from the Illinois case where the experts  
16 were state picked. So we have a whole debate among the  
17 experts there. We did that as a proper responses to your  
18 invitation that we put evidence that we could put in the  
19 record, and we put that in. We didn't attach it to our  
20 first motion because we had not seen the response yet and  
21 justifications, and the motion had been filed before the  
22 Court had us in here to talk about proffer. So that  
23 seemed to us to be the proper timing.

24 The fact that those experts haven't been deposed  
25 doesn't mean it can't be a proffer, the kind of evidence

1 that we can put before the Court. Indeed, what the state  
2 has done here is put all the articles in front of you and  
3 not had any expert at all. You are just suppose to sit  
4 down and read all of these psychological articles and  
5 decide whether Dr. Anderson's analysis of a statistical  
6 significance of some experiment is or is not persuasive.  
7 It seems to be odd to be criticizing us for not having our  
8 experts deposed and they don't have experts to begin, but  
9 in any event, the more fundamental point it seems to me is  
10 that you don't have to look at all of that and try to  
11 parse whether our responses is more persuasive than  
12 theirs. The reality is the psychological evidence does  
13 not satisfy the legal standard even taking it at face  
14 value. There's a huge debate out there, but even assume  
15 that you take the most aggressive evidence, the ones that  
16 they would rely on the most, they say long term over  
17 years, what Judge Balk called a glacial process of  
18 personality development. That's not good enough under  
19 First Amendment standards.

20 So it seem to us given that, the Court ought to  
21 find that we have a high likelihood of success and the  
22 equities favor preliminary relief.

23 Does the Court no further questions?

24 **THE COURT:** No. Thank you.

25 Ms. Barton, anything else?

1                   **MS. BARTON:** The only comment that I would  
2 add is Mr. Smith said they are offering these reports as  
3 proffers. Well, first of all, at the status conference he  
4 said that he was not offering any experts at all, and he  
5 just wanted to know if we would call experts, and then  
6 they put these -- slip these expert reports in after the  
7 fact when they're involved in the Seventh Circuit  
8 litigation, and he represented to this Court that the  
9 first time he knew about the existence of these experts is  
10 after they received what we received, what we filed in  
11 this case? I don't think so.

12                   This case, the Entertainment Software case in the  
13 Seventh Circuit is ongoing. They knew about the experts,  
14 and then what they did was wait for the last minute and  
15 filed them, and they don't even submit the entire record  
16 so we can review them. They refer to paragraphs from  
17 other documents that are filed in the Seventh Circuit  
18 litigation.

19                   We would ask the Court not consider their reports.

20                   **THE COURT:** One thing you did not address in  
21 your argument Ms. Barton was how I would balance the  
22 relative harms of granting or not the preliminary  
23 injunctive relief that's requested. Did you want to talk  
24 about that?

25                   **MS. BARTON:** The only thing that I would add



1 is that in this case the legislature, who is the policy  
2 making arm for the state, has passed this law. It will go  
3 into effect unless this Court enjoins the implementation  
4 of that law. As a matter public policy, statutes are  
5 entitled to a presumption of constitutionality. So the  
6 harm would be the harm that would be visited on any  
7 particular statute by this Court stopping the  
8 implementation of the law, and what the plaintiffs are  
9 speculating might happened, but they have not presented  
10 any evidence to this Court to show that they are going to  
11 have difficulties with a particular percentage of the  
12 video games that are being displayed. They want you to  
13 take their word for it.

14 THE COURT: Okay. All right. Well, I'm  
15 going to issue a written opinion in this case, and I'll  
16 get it done hopefully in time so that if either side wants  
17 to pursue appellate review of the call, you'll have the  
18 opportunity to do so before the December 1st deadline.

19 MR. LEVASSEUR: Thank you, your Honor.

20 THE COURT: Thank you both. It is accurate  
21 to say that you're only asking the Court enjoin the --

22 MR. LEVASSEUR: Title two.

23 THE COURT: Part two of the statute, is that  
24 right.

25 MR. LEVASSEUR: Yes, your Honor.

1                   **THE COURT:** Okay. And you would not concede  
2                   that your failure to challenge the part first is a  
3                   concession?

4                   **MR. LEVASSEUR:** Constitutional considerations  
5                   are quite different in the obscenity. That's a matter  
6                   that's less practical. We don't think it has any  
7                   application to real games in the real world.

8                   **THE COURT:** All right. Thank you.

9  
10                   (Proceedings concluded.)

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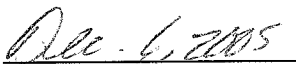
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## C E R T I F I C A T I O N

I, Ronald A. DiBartolomeo, official court reporter for the United States District Court, Eastern District of Michigan, Southern Division, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript has been prepared by me or under my direction.

  
\_\_\_\_\_  
Ronald A. DiBartolomeo, CSR  
Official Court Reporter

  
\_\_\_\_\_  
Date